THE SEA IS OUR GARDEN

AKIBA ON BEHALF OF THE TORRES STRAIT REGIONAL SEAS CLAIM GROUP V COMMONWEALTH OF AUSTRALIA AND ORS [2013] HCA 33

By Gabrielle Lauder, NTRU

The sea is described variously by Torres Strait Islanders as their 'bank', 'garden' and 'supermarket'. The primary judge in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* ('Torres Strait Sea Claim') recognised that Torres Strait Islanders have traditionally exploited marine resources for commercial purposes. In February 2013 the High Court of Australia heard arguments regarding to what extent those native title rights had been extinguished by Queensland and Commonwealth fisheries legislation. This was the first native title case to come before the High Court for some years.

Federal Court decision

The Torres Strait Sea Claim at first instance was handed down in the Federal Court of Australia on 2 July 2010. Justice Finn, the primary judge, found that the Torres Strait Regional Seas Claim Group ('the Sea Claim Group') had established their claim to approximately 37,800 square kilometres of sea between the Cape York Peninsula and Papua New Guinea. The Sea Claim Group included the descendants of the native title holders of 13 island communities within the determination area. The primary judge recognised the non-exclusive right to access and take for any purpose resources from the determination area, which by natural extension includes commercial purposes. His Honour said that the taking of marine resources for a commercial purpose was no more than a particular mode of enjoying this right.

Full Court of the Federal Court decision

On appeal, the Full Court of the Federal Court varied the native title determination to exclude the right to take fish and other aquatic life for sale or trade on the basis that these rights had been extinguished by applicable Queensland and Commonwealth fisheries legislation. The Full Court in the Torres Strait Sea Claim held that although the statutory fishing regimes do not explicitly extinguish native title, the relevant statutes manifest a clear intention to extinguish *all* common law rights and an explicit reference to native title is not necessary to include native title holders within a general prohibition.

High Court decision

On 7 August 2013 the High Court delivered its judgment on the appeal from the Full Court's decision. The High Court was asked to consider whether the statutory fishing regimes in Queensland extinguish commercial fishing rights or merely regulate the exercise of these rights. The High Court unanimously held that the right to take fish and other aquatic life for trade or sale, supported by the native title right to take for any purpose, had not been extinguished by fisheries legislation.

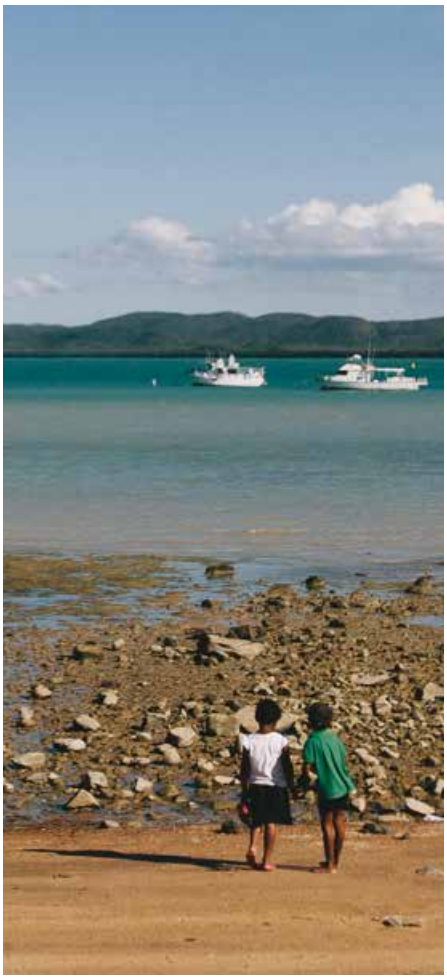
Ultimately the High Court accepted the primary judge's articulation of the right, such that the regulation of commercial fisheries is logically acceptable as mere regulation of the right to take for any purpose. Chief Justice French and Justice Crennan held that neither logic nor construction required a conclusion that a conditional prohibition on taking fish for commercial purposes was directed to the existence of native title rights.

Their Honours cited various provisions of the *Native Title Act 1993*, including s 227, s 238 and s 211, which necessarily assume that native title rights can be affected, restricted or prohibited by legislation without that right itself being extinguished. Section 211 of the Act acknowledges that regulating particular aspects of the usufructuary relationship with traditional waters does not sever the connection of the Torres Strait Islanders with those waters, nor is it inconsistent with the continued existence of that right. The joint judgment of Justices Hayne, Kiefel and Bell also emphasised that the *Native Title Act 1993* lies at the core of this litigation.

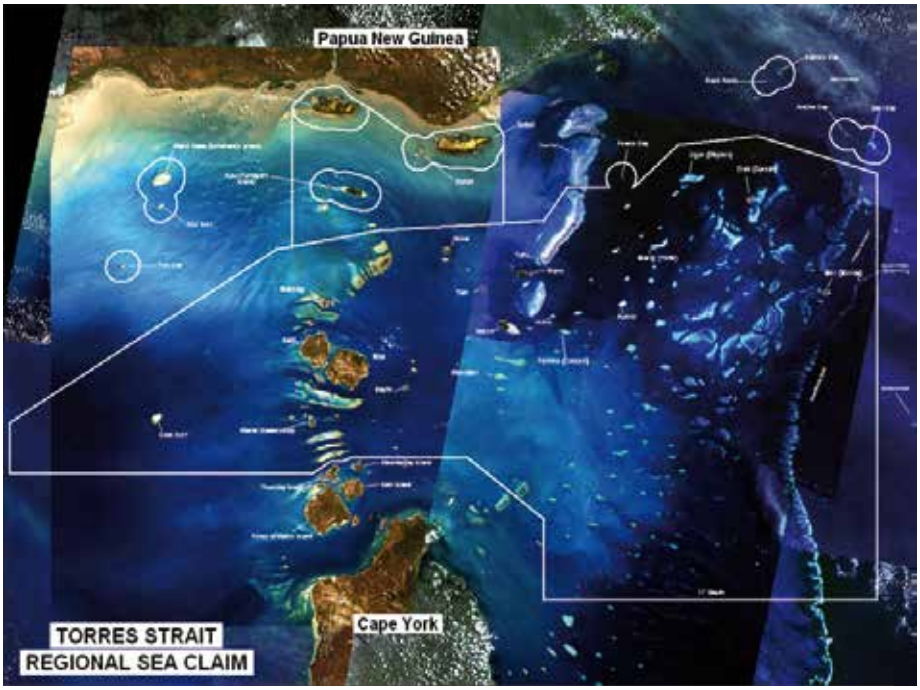
The joint judgment of Chief Justice French and Justice Crennan considered the difficulty in ascertaining a clear and plain legislative intention to extinguish native title, when the applicable statutes were enacted prior to the common law recognition of native title in Mabo. Both judgments therefore turned to inconsistency of rights as the preeminent

criterion for extinguishment. Put simply, native title is extinguished by the creation of rights that are inconsistent with the native title holders continuing to hold their rights and interests.

The respondents relied on *Harper v Minister for Sea Fisheries* in which the effect of the licensing regime was held to convert a public right to take abalone into the exclusive preserve of those who hold licences. The High Court clarified that Harper is not authority for the proposition that native title rights are as freely amenable to extinguishment as public rights derived from common law. The judgment of Justices Hayne, Kiefel and Bell distinguished Harper from the Torres Strait Sea Claim, saying: 'This case concerns the relationship between legislation prohibiting commercial fishing without a licence and rights and interests which are rooted, not in the common law, but in the traditional laws and customs observed by Torres Strait Islanders.'



Opposite page & above: AIATSIS Community Visit to the Torres Strait, 2013. Credit: Daniel Walding, courtesy of Audiovisual Collection, AIATSIS.



Map of Torres Strait Sea Claim determination area. Credit: David Saylor and Rob Blowes, Native Title Conference presentation, Townsville, 2012.

The decision of Justices Hayne, Kiefel and Bell indicated that the Full Court erroneously disregarded the precedent in *Yanner v Eaton* on the basis that it depends upon the availability of s 211 (which only applies to exercising native title rights for non-commercial purposes). However, Yanner established that statutory regulation on the exercise of native title rights and interests, specifically the taking of resources from land and waters, does not conclusively establish extinguishment of native title rights and interests. The relevant question is whether the statutory injunction, 'no commercial fishing without a licence', is inconsistent with the native title right to take resources for any purpose.

No distinct native title right to take fish for sale or trade was found; rather, the relevant right was a right to take resources for any purpose. Chief Justice French and Justice Crennan rejected the submission that the exercise of a general native title right for a particular purpose is a differentiated right that can be characterised as a lesser right by reference to that purpose. Likewise, Justices Hayne, Kiefel and Bell stated: 'It was wrong to single out taking those resources for sale or trade as an "incident" of the right that has been identified.' Focusing on the activity rather than focusing upon the relevant native title right was apt to lead to error.

The effect of this decision is that native title rights, although not extinguished, are still regulated by the statutory fishing regimes in place in Queensland. So what do the Sea Claim Group stand to gain from this decision? This decision provides for recognition that Torres Strait Islanders are a maritime people who have exploited the region's marine resources for millennia. Also, as Counsel for the Sea Claim Group stated, if native title had been partially extinguished 'then nothing by way of future change, radical or otherwise, repeal or otherwise of statutory fishing regimes can lead to its revival.' This decision means the native title rights survive and may be reinvigorated, to be enjoyed to the fullest extent possible under the prevailing regime.

For more information about this decision, please refer to forthcoming article by Gabrielle Lauder and Dr Lisa Strelein on this decision in the September/October 2013 edition of the Australian Lawyers Alliance journal ***Precedent***. This article provides a more expansive analysis of the High Court decision and considers the broader social, economic and cultural issues in the context of native title and commercial fishing rights.